The Central Law Journal.

ST. LOUIS, JULY 10, 1885.

FRANCIS WHARTON.

Doctor Francis Wharton, an engraving from whose photograph we give above, was born in Philadelphia, in 1820, his father being the late Mr. T. I. Wharton, of the Philadelphia bar. Doctor Wharton was also a grand nephew of William Rawle, the elder, the first United States Attorney for Pennsylvania, and a relative of Thomas Wharton, Jr, first Governor of the State. Doctor Wharton, after graduating at Yale College, was admitted to the bar, and was for several years Assistant District Attorney in Philadelphia, under the administration of Governor Shunk. Subsequently, he was, for nearly ten years, a professor in Kenyon College, Ohio, and then went abroad, where he remained for a period, being part of the time connected with the Institute of International Law, of which he is a member. After returning to this country he held professorships of Canon Law, Polity and Apologetics, in Cambridge, Massachusetts; and in Boston, of International Law. In March, 1885, he was appointed by the President counsel to the State Department at Washington, in matters of International Law. He was also made an LL. D. of Edinburg University in this year.

Doctor Wharton is best known by his works on Criminal Law. He has also written on the Conflict of Laws, Evidence, Contracts, Agency, Medical Jurisprudence, and other subjucts. His latest work is a Commentary on American Law.

CURRENT EVENTS.

STATE BAR ASSOCIATIONS.—The programme of the next meeting of the Missouri State Bar Association embraces the following special features: 1. A paper by Henry Hitchcock, on "Some Deficiencies in our Laws Concerning Corporations;" 2. A paper by Charles Hammond, of Brunswick, on the "Rights and Liabilities of Married Women;" 3. A paper by Edward Higbee, of Lancaster, on "Amendments of the Practice Act;" 4. A paper by J. B. Gantt, of Clinton, on "The nisi prius Judge in our Judicial System;" 5. A paper by John L. Thomas, of De Soto, on "Jurisdiction;" 6. A paper by J. V. C. Karnes, of Kansas City, on "Evidence;" 7. Reception and banquet; 8. The annual address by George W. McCrary, of Kansas City, "Evolution in the Law."

The Tennessee Bar Association met at Nashville on the first and second of July. We should think it would have been better for it to meet in some of the mountain resorts, in which that State abounds. The American Bar Association meets at Saratoga Springs on the 18th of August. The proceedings promise to be of unusual interest. The secretaries of other bar associations will confer a special favor on us by sending us notices of their meetings, and also printed copies of their proceedings when published. We claim to be the organ of the bar associations.

OVER-CHARGES IN COURT COSTS. The overcharges of clerks of courts is a scandal to the administration of justice. It is an abuse which exists everywhere. It takes place under the very eyes of the judges. It is an abuse which the members of the bar have not the manhood to resist. It is practiced to a greater extent in the higher than in the lower courts, and to a greater extent where the clerk is appointed by the judges than where

he is elected by the people, The *Maryland Law Record* has recently published, as an advertisement, at the request of a large number of lawyers, an editorial in a secular paper showing that the clerk of the Court of Appeals of that State makes a profit of 150 per cent. on the charges made for printing the records and briefs in cases in that court. In Missouri we have a system nearly as lavish, which was re-enacted by our last legislature, except that the cost does not fall upon the unsuccessful litigant, but upon the State. The clerk of each of the three appellate courts is required to furnish to the reporter of his court, copies of the brief used in every case, for which he is entitled to charge, and for which the State undertakes to pay, 15 cents per hundred words. To begin with, this charge is wholly unnecessary. The State ought never to pay one cent for printing the briefs of lawyers in its official reports. In the second place the rules in these courts require, in addition to the brief filed with the clerk as a part of the record, that counsel file an extra brief for each judge; so that in every case it is possible to supply the reporter with an original of any brief filed in the cause. It is believed that this course is taken by the clerks in some cases; that they merely certifiy these original briefs to the reporter and then charge the State for making them out at the rate of 15 cents per hundred words.* Then, as to the rate of this charge, 15 cents per hundred words, it is an equal wrong upon the State. The best type-writer copying can be had in St. Louis at 4 cents per hundred words. and it is believed that good work of this kind can be had equally as cheap in other portions of the State. But the greatest abuse in the matter of costs lies in the costs in criminal cases, which are paid by the State. The writer has reason to believe that if the bills of criminal costs, which are made out by the clerks of the courts of Missouri and certified by the judges, were carefully investigated by the judges, the aggregate would be cut down fully one-third. There seems to be absolutely no check upon this system of public plundering. The clerks of the Circuit Courts are elected by the people, and are generally influential politicians; and therefore the judges, who are themselves nominated by party conventions and elected by the people, do not like to watch them too closely, or incur their displeasure. The clerks of the appellate courts are appointed by the judges and are either court favorites, or, to use a less offensive word, men in whom the judges have peculiar confidence; and therefore they go unwatched, and these abuses goes on. Of course, clerks of courts ought to be fairly and well paid. The great body of them are honorable, hard-working and deserving men. But the practice of making excessive estimates of the number of words contained in transcripts made by them, and of charging for constructive services, grows on them insensibly, and, there being no substantial check upon it, it finally acquires the force of precedent, and becomes so to speak, an inherited abuse.

* The clerk of the St. Louis Court of Appeals certifies to the reporter of the court the briefs on file, where possible, and charges only the legal fee for the certificate.

THE MANITOBA EXEMPTION LAW.—A good deal of agitation has recently taken place in Canada about a law passed by the legislature of the province of Manitoba, exempting certain property of debtors from execution. Under this law, as it is reported in the press dispatches, the judgment debtor may retain, exempt from seizure, household effects to the value of $500; clothing necessary for his family; books of professional men and tools of mechanics; food for sixty days; and, of the farm land on which he actually resides, up to an area of 160 acres, if only partially cultivated, with the house, stables and stock; while a judgment debtor other than a farmer may retain his residence up to the value of $2,500. The agitation which this statute has produced is calculated to draw curious attention to the difference between the constitutional law of Canada—for Canada now has a constitutional law—and that of the United States. Similar statutes have long existed in the United States, and in some of the Western and Southern States the exemptions are larger than those created by this Manitoba statute.[1] These statutes, when retroactive by their terms, have been held to be void, under that

[1] See Thompson on Homesteads and Exemptions, *passim*.

provision of the constitution of the United States,[2] which declares that no State shall pass any law impairing the obligation of contracts.[3] But under the theory of the omnipotence of the legislature, which is part of the British constitution, this Manitoba statute, if not disallowed by the Dominion Government under a species of veto power which that government possesses under the constitution of Canada, known as "the British North America Act, 1867," will be valid, although retro-active. The Dominion parliament itself exercises the power of passing acts discharging the obligation of contracts, such as the so-called "Arrangement Acts" which insolvent railway companies procure from parliament in Great Britain; and the Supreme Court of the United States has gone so far on questionable grounds we venture to think as to hold such acts to be valid in their operation upon the rights of our own citizens enforceable in our own courts.[4] It is to be perceived that the difference between the constitional law of Canada and that of the United States with reference to the abrogation of local statutes, is that the legislatures of the several American States have plenary power to pass laws, except so far as they are restrained, (1) by the constitution of the United States, (2) by the constitution of the particular state. And whether a State statute is so inhibited is in every case a judicial, and not a political question; it is to be decided by the judicial courts, and not by the "government." Our system is founded on the idea of State sovereignty; theirs is founded on the idea of provincial subordination. In theory, no discretionary power exists above our States which is capable of overruling their legislation; but above the Canadian Provinces exists the Dominion Government, which possesses such a discretionary power. The Provinces of Canada, therefor, have really no more legislative power than our municipal corporations have in the United States; for these corporations possess a delegated legislative power, and their legislation, when within the scope of their granted powers, cannot be overturned, except by the legislature of the particular State, and, in some cases, as in the case of the City of St. Louis, not even by the State legislature. Whether the Canadian system is preferable to ours, is a very large question. It is perceived that the "centralization" which is so much dreaded by one school of politics in America, exists in a large degree in Canada: and if the Dominion Parliament should overrule this act, of the Manitoba legislature, it would be exactly what our politicians would call an act or instance of centralization. But after all, if local legislation is to be suppressed because deemed unreasonable, unjust, or contrary to the general policy, the question remains, is it not better that the power to suppress it should be entrusted to a government responsible to the electors rather than to an appointive judiciary responsible for discretionary acts to no one.

[2] Const. U. S. Art. 1, § 10.

[3] Gunn v. Barry, 15 Wall. 610, (reversing Gunn v. Barry, 44 Ga. 353); Chambliss v. Jordan, 50 Ga. 81; Wofford v. Gaines, 53 Ga. 485; Gunn v. Thornton, 49 Ga. 380; Clark v. Trawick, 56 Ga. 359; Larence v. Evans, 50 Ga. 216; Whittington v. Colbert, 50 Ga. 584; Grant v. Cosby, 51 Ga. 460; Smith v. Whittle, 50 Ga. 626; Burnside v. Terry, 51 Ga. 186; McPhee v. Guthrie, 51 Ga. 83; Smith v. Ezell, 51 Ga. 570; Pratt v. Atkins, 54 Ga. 569; Wheeler v. Redding, 55 Ga. 87; Bush v. Lester, 55 Ga. 579; Lesley v. Phipps, 49 Miss. 790; Pennington v. Seal, 49 Miss. 528; The Homestead Cases, 22 Gratt, 266; Russell v. Randolph, 26 Gratt. 705; Cochran v. Darcy, 5 S. C. 125; (s. c., 1 C. L. J. 179); *Ex parte* Hewett, 5 S. C. 409; De La Howe v. Harper, 5 S. C. 470.

[4] Canada Southern R. Co. v. Gebhard, 17 Rep. 225.

NOTES OF RECENT DECISIONS.

USURY—NOT USURY FOR BORROWER TO MAKE GOOD TO LENDER WHAT HE WILL LOSE BY WITHDRAWING MONEY FROM SAVING'S BANK.—In *Washburne v. Ryder*,[5] the City Court of New York recently held that if A. has money on deposit in a savings bank, which will not draw interest unless it is allowed to remain a given length of time, and B. desires to borrow it of A., it is not usury for A. to require B. to make good to him what he would lose by the immediate withdrawal of the deposits. The court cite Hager v. McCullough,[6] and Thurston v. Cornell.[7]

USURY—GIVING ONE EMPLOYMENT IN CON-

[5] Daily Register, June 23, 1885.

[6] 2 Denio, 119.

[7] 38 N. Y. 285.

SIDERATION OF A LOAN OF MONEY.—It has been lately held by the New York City Court in general term in *Washburne v. Hyatt*,[8] that for a merchant to give a man employment in his business, in consideration of a loan of money, is not usury, provided substantial services are rendered, and the contract of hiring does not appear to be a mere cloak for usury. The court cite Clarke v. Sheehan.[9]

CONSTITUTIONAL LAW — POLICE REGULATIONS—LAWS PROHIBITING THE MANUFACTURE OF OLEOMARGARINE AND BUTTERINE UNCONSTITUTIONAL:—In the case of the *People v. Marx*,[10] not yet reported, the Court of Appeals of New York has held the following statute unconstitutional: "No person shall manufacture out of any oleaginous substance or substances, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream of the same, or shall sell or offer for sale the same as an article of food. This provision shall not apply to pure skim milk, or cheese made from pure skim milk. Whoever violates the provisions of this section shall be guilty of a misdemeanor, and be punished by a fine of not less than $100 nor more than $500, or not less than six months' or more than one year's imprisonment for the first offense, and by imprisonment for one year for each subsequent offense." The opinion of the court was delivered by Rapallo, J., all the judges concurring. The three judges of the Supreme Court are said to have been of the same opinion, but they affirmed the conviction, in order that an appeal might be taken, and the opinion of the Court of Appeals obtained on the constitutional question involved. We have not seen the full text of the decision; but the grounds of constitutional objection to the law are said to be summarized in the following language of the Court of Appeals, by Rapallo, J.: "The law attempts to prohibit the sale of any articles intended to take the place of butter. This prevents competition and places a ban upon progress and invention. It invades the rights both of person and property guaranteed by the constitution. The sale of a substitute for any article of manufacture is a legitimate business, and, if effected without deception, cannot be arbitrarily suppressed. This act is not aimed at deception, but goes further, and in effect creates a monopoly destructive of rights protected by the Constitution both of the State and the United States." Parties interested in upholding the law, have caused the statement to be circulated through the Associated Press dispatches that the prosecution of Marx was a sham; that the case was a trick concocted to get the question before the Court of Appeals for decision, without the side of the people being properly argued and presented; and that the decision is nothing more than the decision of the Court of Appeals in a moot case. If this is so, it is a great scandal, and those who have practiced the imposition upon the court are liable to punishment; for it is a contempt of court to bring a fictitious action for the purpose of getting the court's opinion.[10] The same question was decided the other way in Missouri on a statute almost identical in language with the above statute of New York.[11] Mr. Justice Miller at Circuit in Missouri found nothing in the same statute in conflict with the Federal Constitution.[12]

[8] Daily Register, for June 23, 1885.
[9] 47 N. Y. 188.
[10] Smith v. Brown, 3 Tex. 360.
[11] State v. Addington, 12 Mo. App. 214; s. c., affirmed, 77 Mo. 110. In the Supreme Court Mr. Chief Justice Hough dissented.
[12] *Re* Brosnahan, 18 Fed. Rep. 62.

LIMITATIONS IN INSURANCE POLICIES AS TO TIME OF BRINGING SUIT.

Frequently, perhaps always, the following conditions are found in policies of insurance: (1) That proofs of loss must be filed, (2) that after the proofs of loss have been filed the company shall have a certain time in which to pay the loss, and (3) that an action cannot be maintained on the policy unless commenced in a given period. These conditions are all valid, and tend to hasten the adjustment of claims against the companies, and

therefore the law favors them, and lends its aid in the enforcement thereof.[1]

Let us direct our attention chiefly to the one limiting the time of bringing suit. The substance of this condition is that, the insured must commence suit within a certain time after loss, and, that if he fails to do so, he cannot recover afterwards. This is held by the courts to create a period of limitation within which suit must be brought, and that it is as binding between the parties as the statute of limitations would have been, had this limitation not been entered into. The difficulty is to determine when this period begins to run. Does it run from the date of the loss, the physical destruction or injury of the property, or from the time that the right of action accrues to the insured? Will the courts construe it literally, or in connection with the attendant provisions? The authorities are not in harmony upon this point, so let us breifly examine a few of the leading decisions on both sides, and endeavor to ascertain the true rule of construction, keeping in view all the time the fact that the proofs of loss are not required to be filed in any definite time.

I. It must, as will appear from the following authorities,[2] be construed in connection with the attendant provisions, and not literally. This line of authorities holds that the period of limitation runs from the time that the right of action accrues to the insured, which is upon the expiration of the time allowed the company to pay the loss after the proofs have been filed, and not from the destruction of the property or injury to it. In thus construing this condition, the courts depart from the literal meaning of the words, and why? What is the reason? Now, when the proofs are not required to be filed in a definite time, it is implied that they are to be filed in a reasonable time. Such being the case, circumstances may intervene, owing to which the filing may be delayed a considerable length of time, but still the time under the peculiar circumstances may be reasonable, and of greater duration than the limitation created by the condition. That is, the right of action would be barred before it accrued were this condition literally construed.

II. On the other hand[3] it is held that this condition is to be construed literally, irregardless of the accompanying provisions. These courts simply hold the parties to their words, and read the contract just as it was written. This contract was a voluntary one, and the company had the same right to insert these conditions as others, and if the insured had any objections he was under no obligations to conclude the contract, but, as he voluntarily entered into it, he must be bound and abide by it.[4]

The first of these views seems the better, and more consonant with justice and reason. Let any one of a legal mind examine this question and reason it out, and the soundness of this rule will be apparent to him. Let him search for the intention of the parties, which always governs, and can he then assert that the intention was to bar the right of action before there was one? Certainly not! Go beneath the surface of these words, and gather the intention from the whole instrument, and the logic of this rule cannot be lost sight of.

III. Such being the rule when the conditions are as above, what would it be if the proofs had to be filed in a certain, fixed time? For instance, assume that the proofs had to be filed within one month from loss, and that the action must be commenced within a year from loss. Besides this, the company always has a time in which to pay loss after the proofs are filed, say sixty days in this case. Now, what is the rule? The same as above or different? This is an open question. One of the above rules must obtain, and which? Would it run from loss or from the expiration of the time given the insured to file his proofs

[1] Patrick v. Farmer's Ins. Co., 43 N. H. 621; Ripley v. The Ætna Ins. Co. 30 N. Y. 136; Woodbury Savings Bank and Building Association v. The Charter Oak Fire & Marine Ins. Co., 31 Conn. 517; The North Western Ins. Co. v. The Phœnix Oil & Candle Co., 31 Pa. St. 448; Carter v. The Humboldt Fire Ins. Co., 12 Iowa 287.

[2] May on Ins. § 479; The Mayor, etc. of New York v. The Hamilton Fire Ins. Co., 39 N. Y. 45; Ames v. The New York Union Ins. Co., 14 N. Y. 253; Hay v. Star Fire Ins. Co., 77 N. Y. 235; Steen v. The Niagara Fire Ins. Co., 89 N. Y. 315; Ellis v. The Council Bluffs Ins. Co., 20 N. W. Rep. (an Iowa case) 782.

[3] Glass v. Walker, 66 Mo. 32; Johnson *et al* v. The Humboldt Ins. Co., 91 Ill. 92; Fullam v. New York Union Ins. Co., 7 Gray, 61; Keim v. Mutual Fire & Marine Ins. Co. of St. Louis, 42 Mo. 38.

[4] Cray v. Hartford Fire Ins. Co., 1 Blatchf. C. C. 280; Wilson v. Ætna Ins. Co., 27 Vt. 99; Amesburg v. Bowditch Mutual Fire Ins. Co., 6 Gray, 596; Glass v. Walker, 66 Mo. 32; Keim v. Mutual Fire and Marine Ins. Co., 42 Mo. 38.

and also the time given the company to pay? We think the former is the true rule. Here there can be no possibility that the insured's right of action would be barred before it accrued, as the proofs must be filed in one month from loss, and then the company has sixty days in which to pay, and, if the limitation is one year, would not the insured have nine full months left within which he could commence his action? Would there be any injustice in saying that in this case the condition is to be construed according to the letter? What reason is there for saying this was not their intention? In placing this construction upon this condition would it operate to work any prejudice to the insured? He has ample time to seek his relief, and if he sleeps on his rights, or allows the grass to grow under his feet is that any reason for placing a forced construction on these words, words that are used by all classes, nothing technical about them, and for the purpose intended, more apt words could not have been employed? What then can be the reason for construing this the same as when the proofs must be filed, not in a fixed time, but in a reasonable time? We can see none, and think that the above rule of construction has no applicability here whatever. When the reason for the rule ceases, the rule itself is inoperative, or ought to be. Thus it seems apparent that in a condition, such as last stated, the period of limitation should run from loss, and not otherwise, as the reason for the first construction above, viz: The right of action might be barred before it accrued, does not apply.

CHAS. E. LYON.

Dubuque, Io.

EXCLUDING PUPILS FROM PUBLIC SCHOOLS.

Previous to the year 1845, there was no statute provision in Massachusetts, nor in any other State, so far as is known, making it unlawful for a teacher or the general school committee, to exclude a pupil from the public schools; but in consequence of a decision of the Supreme Court,[1] in 1839, an act was passed in 1845, chap. 214. which is substantially incorporated into the recently enacted Public Statutes[2] of Mass. which provides, that a child unlawfully excluded from a public school may recover damages therefor in an action of tort, to be brought in the name of such child, by his guardian or next friend, against the city or town by which such school is supported. This statute left the question open,[3] as to what is, and what is not, a wrongful exclusion; which must depend upon other provisions of law. This statute provides a remedy for any child wrongfully excluded from public school instruction.

The sufficient reasons for excluding a pupil from a public school are left with the general school committee.[4] Chief Justice Shaw says in this case, "But the court are of opinion, that the schools have not been left by the law without reasonable protection in this respect: and that a power is vested in the general school committee, or the master, with their approbation and direction, to exclude a pupil, although within the prescribed age of seven and sixteen, for good and sufficient cause."

Thus we see, that whenever for sufficient cause, it becomes necessary to exclude a pupil from a public school, such duty devolves upon the general school committee, and not upon the teacher, except as an agent of the committee, to carry out their order.[5]

The teacher of a public school, is not an independent public officer, bound to exercise the duties of his office, for the benefit of individuals, under fixed and settled rules and obligations, prescribed by law, like a sheriff; nor is he to exercise his own will and judgment, in receiving or excluding pupils.[6]

In this first leading case of Spear v. Cummings, Judge Shaw held that, "The general charge and superintendence, in the absence of express legal provisions, includes the power of determining what pupils shall be received and what pupils rejected." "The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parent shall refuse to

[1] Spear v. Cummings, 23 Pick. 224.

[2] Pub. Stat. Mass. Chap. 47, § 12, 12 Allen, 127.
[3] Sherman v. Charlestown, 8 Cush. 162.
[4] Sherman v. Charlestown, 8 Cush. 163.
[5] Sherman v. Charleston, 8 Cush. 163.
[6] Spear v. Cummings, 23 Pick. 225.

comply with regulations necessary to the discipline and good management of the school."[7]

If a child of proper age and qualifications is rejected by the teacher of a public school, the proper course of the parent to pursue is to appeal to the committee, and if the teacher refuses to receive the pupil, then they have a remedy on their contract with the master.

There is no provision of law warranting the exclusion of a pupil from a public school, but it results by a necessary provision requiring good discipline, and hence the right to attend is a qualified right, depending upon conditions.[8]

The sole remedy for a child to recover damages for exclusion from the public schools is an action of tort under the statute, against the city or town, not as a private right, but as a political right, belonging to the pupil as a member of the community in which he resides, and in common with all others of the same community, and is exclusive of other remedies.[9]

A pupil in a public school, who does not conform to the rule to prevent tardiness may be excluded, under the direction of one member of the school committee, although such rule had not been formerly established or confirmed by vote of the school committee, duly entered upon their record; especially when such rule was subsequently approved of by each of the other members.[10]

The duties of the school committee, as prescribed by the statute, are, that they shall have the general charge and superintendence of all the public schools in town, and as such, they have the legal right to exclude a scholar for acts of neglect, carelessness of posture in his seat—and in recitation, tricks of playfulness, and inattention to study and the regulations of a school in minor matters, such as whispering, laughing, acts of playfulness and rudeness to other scholars, inattention to study, and conduct tending to cause confusion and distract the attention of other scholars from their studies and recitations, and especially when such conduct is persisted in, after repeated remonstrances and admonitions from teachers and the committee."[11]

When the superintending school committee of a town pass an order that the schools of the town should be opened each morning with reading from the Bible and prayer, and that during the prayer the scholars should bow their heads, and in consequence of a parent of a scholar objecting to his child bowing the head, and when the committee modifies the order that any scholar should be excused from bowing the head, whose parent requested it, and the parent declining to request such exemption, and the scholar still persisting in not bowing the head, may be excluded from the school, until the scholar should do so, or the parent request that the pupil should be excused thereform.

This is held to be within the scope and authority of the school committee of a town to pass all reasonable rules and regulations for the government, discipline and management of the public schools under their general charge and superintendence.[12]

Sandwich, Mass. E. S. WHITTEMORE.

[7] *Ibid.*

[8] Roberts v. Boston, 5 Cush. 198; Sherman v. Charlestown, 8 Cush. 160; Spiller v. Woburn, 12 Allen, 127; 10 Allen, 143; Hodgkins v. Rockport, 105 Mass. 475.

[9] Learock v. Putnam, 111 Mass. 499; Reynolds v. Hanrahan, 100 Mass. 313; Spear v. Cummings, 23 Pick. 224; Sherman v. Charlestown, 8 Cush. 160; Dwinnels v. Parsons, 98 Mass. 470.

[10] Russell v. Lynnfield, 116 Mass. 365; Huse v. Lowell, 10 Allen, 149; Hodgkins v. Rockport, 105 Mass. 475; Sherman v. Charlestown, 8 Cush. 160; Spiller v. Woburn, 12 Allen, 127.

[11] Hodgkins v. Rockport, 105 Mass. 475, and cases cited.

[12] Spiller v. Woburn, 12 Allen, 127; Donahoe v. Richards, 38 Maine, 379; Guernsey v. Pitkin, 32 Vermont, 224; Sherman v. Charlestown, 8 Cush. 160; Roberts v. Boston, 5 Cush. 198.

ACCORD AND SATISFACTION.

ROGERS v. ROGERS.

Supreme Judicial Court of Massachusetts, June, 1885.

1. CONTRACT. — *Accord and Satisfaction — When New Agreement Discharges Breaches of Old Ones.*—A new agreement, covering the subject-matter of an old one, discharges any liability for breaches of the old one, unless it appear that the intention of the parties was otherwise.

2. ———. *Illustration—Breach of Agreement to Sell at a Certain Discount from Trade Prices.*— Thus, where a wholesale dealer agreed with a customer to sell him certain goods during the season at a certain discount from the trade price, and after a time violated the agreement and reduced the discount, and the customer, unable to buy the goods elsewhere, was forced to submit to the advance, and to agree to buy th

goods during the rest of the season at the reduced discount, it was held that the second agreement was an accord and satisfaction in respect of the breaches of the first.

There was an action of contract to recover damages for the breach of a contract to sell and deliver goods to the plaintiffs in Boston.

At the trial before the court without a jury the plaintiffs introduced testimony tending to show that, on or about July 8, 1879, the defendant, by its agent, C. A. Hamilton, orally agreed to sell and deliver to the plaintiffs in Boston, from time to time, as ordered by them, such silver-plated ware, to-wit; spoons and forks, as they might need in their business and order during the "season," that is, between said July and January 1, 1880, at stipulated discounts from certain list prices, and that the goods were to be paid for at the end of each month; that, pursuant to this contract, and on the day of the date of it, and at different times previously to October 14, the plaintiffs ordered goods amounting in the aggregate to several thousand dollars, a part of which was delivered and paid for according to the contract; that on October 14 the defendant utterly repudiated its contract, and refused to fill any of the unfilled orders, or to receive and fill any future orders, except upon the express promise on the part of the plaintiffs to pay for the goods at a less rate of discount than that stipulated in the contract, the effect of which was to advance the price of said goods about eight and one-fourth per cent. on the agreed price; that the plaintiffs, after several days' delay, and not being able to buy the goods elsewhere on so favorable terms, or at any price, agreed to buy them of the defendant during the remainder of the "season" upon the new terms demanded by the defendant.

Against the objection of the plaintiffs the Court ruled that the payment of said advance prices by the plaintiffs subsequent to October 14 was a voluntary payment; and on this ground alone found for the defendant. To this ruling the plaintiffs excepted.

D. C. Linscott, for the plaintiffs; *Boardman & Tyng*, for the defendant.

FIELD, J., delivered the opinion of the court:

We infer from the report that the court found that the contract was not merely an offer by the defendant to sell, which would have been revocable at any time, except so far as it had been accepted by the plaintiffs in giving orders, and would thus be a contract only to the extent of these orders, but that it was a contract whereby the plaintiffs agreed to buy, and the defendant agreed to sell such of the goods dealt in by the defendant as the plaintiffs needed in their trade during the time specified. See Dickinson v. Dodds, 2 Ch. D. 463. The plaintiffs were bound in law to pay for the goods sent after the new agreement was made according to the prices stipulated in that agreement. In this Commonwealth the delivery of the goods by the defendant under the new agreement, whether they were sent to fill the orders given before October 14, or the orders given after, is considered a sufficient consideration for the new promise of the plaintiff. Whether the new agreement was substituted for the old, and thus operated as a recision or discharge of it must be determined by the intention of the parties, to be ascertained from their correspondence and conduct. Peck v. Regna, 13 Gray 407; Munroe v. Perkins, 9 Pick. 298; Holmes v. Doane, 9 Cush. 135; Stearns v. Hall, 9 Cush. 31; Cummings v. Arnold, 3 Met. 486; Cooke v. Murphy, 70 Ill. 96; Lawrence v. Dewey, 28 Vt. 264; Stewart v. Kettus, 36 N. Y. 388; Moore v. Locom. Wks. 14 Mich. 266. If we assume that the original agreement was sufficiently definite to constitute a valid contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. As to the orders given before October 14, which the defendant had refused to fill, if the new contract by its terms covered those, we think the same rule holds. If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new contract would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge or an accord and satisfaction, unless it appeared that such was not the intention of the parties. Such a substituted agreement *prima facie* takes the place of the original agreement as to everything remaining unperformed. Our construction of the correspondence and conduct of the parties is that it was not understood or intended by both parties that the plaintiffs should retain their right of action, if they had any, for the alleged breach of their original contract.

Judgment for the defendant.

CRIMINAL PROSECUTIONS BY INFORMATION—HABEAS CORPUS.

EX PARTE WILSON.

Supreme Court of the United States, March 30, 1885.

1. HABEAS CORPUS.—*Jurisdiction of U. S. Supreme Court.*—This court cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence.

2. CRIMINAL LAW AND PROCEDURE.—*Prosecutions*

by Indictment of Information—Rev. St. U. S. § 1022.—The provision of Rev. St. § 1022, authorizing certain offenses to be prosecuted either by indictment or by information, does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the Constitution and laws of the United States.

3. HABEAS CORPUS—*After Conviction—Erroneous Recital in Record.*—In the record of a general conviction and sentence upon two counts, one of which is good, a misrecital of the verdict as upon the other count only, in stating the inquiry whether the convict had aught to say why sentence should not be pronounced against him, is no ground for discharging him on *habeas corpus.*

4. ———. *Commitment to Prison in State other than Where Convicted.*—In the record of a judgment of a district court, sentencing a person convicted in one State to imprisonment in a prison in another State, the omission to state that there was no suitable prison in the State in which he was convicted, and that the attorney general had designated the prison in the other State as a suitable place of imprisonment, is no ground for discharging the prisoner on *habeas corpus.*

5. ———. *Certified Copy of Record of Sentence.*—A certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or *mittimus.*

6. ———. *Presentment or Indictment by Grand Jury—Fifth Amendment.*—A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the fifth amendment of the Constitution, is entitled to be discharged on *habeas corpus.*

6. ———. *Infamous Crime.*—A crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the provision of the fifth amendment of the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

Petition for a Writ of *Habeas Corpus.*

Mr. Alfred Russell for the petitioner; Mr. Assistant Attorney General *Maury*, for the respondent.

MR. JUSTICE GRAY, stated the case and delivered the opinion of the court:

This is a petition for a writ of *habeas corpus*, presented to this court by a man confined in the house of correction at Detroit, in the state of Michigan, under a sentence to be imprisoned there for 15 years at hard labor, passed by the district court of the United States for the Eastern district of Arkansas, upon an information filed by the district attorney for that district. The record of the conviction and sentence, a copy of which was annexed to the petition, showed the following case:

The information, which was filed by leave of the court, contained two counts: The first count upon Rev. St. § 5430, for unlawfully having in possession, with intent to sell, an obligation engraved and printed after the similitude of securities issued under authority of the United States, to-wit: of an interest-bearing coupon bond of the United States; and the second count upon § 5431, for passing, with intent to defraud, a counterfeited interest-bearing coupon bond of the United States; and each count alleging that the bond was in the words and figures of a copy attached to the indictment and made part thereof. That copy was of an instrument purporting to be a bond of the United States Silver Mining Company of Denver City, Colorado, having printed at its head the words "The United States," in large and conspicuous capitals, followed on a lower line by the words "Silver Mining Company of Denver City, Colorado," in much smaller and less distinct type, and bearing the signatures of "R. E. Hullson, Pres't," and "J. H. Mayson, Sec'y," and otherwise numbered and lettered very much like a genuine bond of the United States. The defendant filed a general demurrer to the information, which was overruled by the court; and he then pleaded not guilty, and was tried by a jury, who returned a general verdict of guilty; and he moved for a new trial, for insufficiency of the evidence to support the verdict.

The rest of the record (a certified copy of which was the only paper delivered to the keeper of the house of correction) stated that the defendant was brought to the bar in the custody of the marshall, and his motion for a new trial overruled, "and the said defendant, being now inquired of by the court if he have aught to say why the judgment and sentence of the court should not now be pronounced against him upon the verdict and finding of the jury in this case, finding him guilty of passing a counterfeit United States bond, and saying nothing further than he hath already said; and the court being now well advised in the premises; it is therefore considered, ordered, adjudged, and sentenced that said defendant, James S. Wilson, do pay to the United States a fine of five thousand dollars for said offense and all the costs of this proceeding, and that the United States have execution therefor, and that he be imprisoned for and during the term of fifteen years at hard labor in the house of correction at Detriot, Michigan, and that the said marshal of this district convey the said prisoner to the house of correction aforesaid, and deliver him to the custody of the keeper thereof, and that the clerk of this court make out for said marshal two copies of this judgment and sentence, duly certified under the seal of this court, one of which the said marshal shall deliver to the keeper of said house of correction, and the other return and file in this court, with the receipt of said keeper thereon."

The offense described in Rev. S. § 5430, is punishable by a fine of not more that $5,000, or by imprisonment at hard labor not more than 15 years, or by both, and the offense described in section 5431 is punishable by a like fine and imprisonment. The petitioner alleged in this petition, and contended in argument, that his imprisonment was illegal, upon the following grounds: First. That in excess of the power of the court, and in violation of the fifth amendment of the constitution, he had been held to answer for an

infamous crime, and punished by a fine of five thousand dollars and imprisonment for the term of fifteen years at hard labor, without presentment of indictment by a grand jury. Second. That he was held under a judgment void, and in excess of the power of the court, upon an information for a crime which was not committed against the provisions of chapter 7 of the title "Crimes" in the Revised Statutes, in which cases informations were expressly authorized, and to which they were impliedly restricted, by section 1022 of those statutes. Third. That the judgment was void and in excess of the power of the court, because the conviction and the sentence were for different offenses, the conviction being for having in possession a bond of a mining company in the similitude of a United States bond, and the sentence being for passing a counterfeit United States bond. Fourth. That he was held by the keeper of the Detroit house of correction without authority of law, because the order of the court for his imprisonment did not show that the court had determined two questions of fact which were made by Rev. St. §§ 5541, 5546, conditions precedent to the exercise of its power to sentence to a prison outside the State of Arkansas, namely, (1,) that there was no suitable prison in that state, and (2) that the attorney general had designated the Detroit house of correction as a suitable penitentiary in another state. Fifth. That the keeper had no warrant or *mittimus* authorizing him to hold the prisoner, as required by Rev. St. § 1028.

It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence. *Ex parte* Watkins, 3 Pet. 193, and 7 Pet. 568; *Ex parte* Lange, 18 Wall. 163; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Curtis, 106 U. S. 371; S. C. 1. Sup. Ct. Rep. 381; *Ex parte* Carll, 106 U. S, 521; S. C. 1 Sup. Ct. Rep. 535; *Ex parte* Yarbrough, 110 U. S. 651; S. C. 4 Sup. Ct. Rep. 152; *Ex parte* Crouch, 112 U. S. 178; S C. *ante* 96; *Ex parte* Bigelow, 113 U. S. 328: S. C. *ante*, 542.

None of the grounds on which the petitioner relies, except the first, require extended discussion. The provision of Rev. St. § 1022 derived from the civil rights act of May 30, 1870, c. 114, § 8, authorizing certain offenses to be prosecuted either by ndictment or by information, does not preclude the prosecution by information of other offenses of such a grade as may be so prosecuted consistently with the constitution and laws of the United States.

The objection of variance between the conviction and the sentence is not sustained by the record. The first count is for unlawfully having in possession, with intent to sell, an obligation engraved and printed after the similitude of securities issued under authority of the United States, and the copy annexed and referred to in that count is of such an obligation. Both the verdict and the sentence are general, and therefore valid if one count is good. Snyder v. U. S. 112, U. S. 216; S. C. *ante*, 118. The misrecital of the verdict, in the statement of the intermediate inquiry whether the prisoner had aught to say why sentence should not be pronounced against him, is no more than an irregularity, or error, not affecting the jurisdiction of the court.

The omission of the record to state, as in *Ex parte* Karstendick, 93 U. S. 396, that there was no suitable penitentiary within the state, and that the attorney general had designated the house of correction at Detroit as a suitable place of imprisonment outside the state, is even less material. The certified copy of the record of the sentence to imprisonment in the Detroit house of correction, if valid upon its face, is sufficient to authorize the keeper to hold the prisoner, without any warrant or *mittimus*. People v. Nevins, 1 Hill, (N. Y.) 154. But if the crime of which the petitioner was accused was an infamous crime, within the meaning of the fifth amendment of the constitution, no court of the United States had jurisdiction to try or punish him, except upon presentment or indictment by a grand jury. We are therefore necessarily brought to the determination of the question whether the crime of having in possession, with intent to sell, an obligation engraved and printed after the similitude of a public security of the United States, punishable by fine of not more than $5,000, or by imprisonment at hard labor not more than 15 years, or by both, is an infamous crime, within the meaning of this amendment of the constitution.

The first provision of this amendment, which is all that relates to this subject, is in these words: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The scope and effect of this, as of many other provisions of the constitution, are best ascertained by bearing in mind what the law was before. Mr. William Eden, (afterwards Lord Auckland,) in his Principles of Penal Law, which passed through three editions in England and at least one in Ireland within six years before the declaration of independence, observed: "There are two kinds of infamy, the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." Eden, Prin. P. L. c. 7, § 5. At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. Pendock v. Mackinder, Willes, 665; Gilb. Ev. 143; 2 Hawk. c. 46 § 102; The King v.

Priddle, 1 Leach, (4th Ed.) 442. This disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness, and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses, or the uttering of counterfeit coin or forged securities. 1 Greenl. Ev. § 373; Utley v. Merrick,, 11 Metc. 302; Fox v. Ohio, 5 How. 410, 433, 434. But the object and the very terms of the provision in the fifth amendment show that incompetency to be a witness is not the only test of its application.

Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. But whether a man shall be put upon his trial for crime without a presentment or indictment by a grand jury of his fellow-citizens depends upon the consequences to himself if he shall be found guilty. By the law of England, informations by the attorney general, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common low occasioned a total forfeiture of the offender's lands or goods, or both. 4 Bl. Comm. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. The fifth amendment, declaring in what cases a grand jury should be necessary, and, in effect, affirming the rule of the common law upon the same subject, substituting only, for capital crimes or felonies, "a capital or otherwise infamous crime," manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. The leading word "capital" describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them.

A reference to the history of the proposal and adoption of this provision of the constitution confirms this conclusion. It had its origin in one of the amendments, in the nature of a bill of rights, recommended by the convention by which the State of Massachusetts in 1788 ratified the original constitution, and as so recommended was in this form: "No person shall be tried for any crime by which he may incur an infamous punishment or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces." Journal Massachusetts Convention 1788, (Ed. 1856,) 80, 84, 87; 2 Elliot's Debates, 177. As introduced by Mr. Madison in 1789 at the first session of the house of representatives of the United States, it stood thus: "In all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary." Being referred to a committee, of which Mr. Madison was a member, it was reported back in substantially the same form in which it was afterwards approved by congress, and ratified by the States. 1 Annals Cong. 435, 760. Mr. Dane, one of the most learned lawyers of his time, and who as a member of the continental congress took a principal part in framing the ordinance of 1787, for the government of the Northwest territory, assumes it as unquestionable that, by virtue of the amendment of the constitution, informations "cannot be used where either capital or infamous punishment is inflicted." 7 Dane, Abr. 280. Judge Cooley has expressed a similar opinion. Cooley, Const. Law, 291.

The only mention of informations in the first crimes act of the United States is in the clause providing that no person "shall be prosecuted, tried, or punished, for an offense not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offense, or incurring the fine or forfeiture." Act, April 30, 1790, c. 9, § 32, (1 St. 119.) For very many years afterwards informations were principally, if not exclusively, used for the recovery of fines and forfeitures, such as those imposed by the revenue and embargo laws. Acts July 31, 1789, c. 5, § 27, (1 St. 43;) March 26, 1804, c. 40, § 3; and March 1, 1809, c. 24, § 18, (2 St. 290, 532;) U. S. v. Hill, 1 Brock. 156, 158; U. S. v. Mann, 1 Gall. 3, 177; Walsh v. U. S. 3 Wood. & M. 341. Mr. Justice Story, writing in 1833, said: "This process is rarely recurred to in America, and it has never yet been formally put into operation by any positive authority of congress, under the national government in mere cases of misdemeanor; though common enough in civil prosecutions for penalties and forfeitures." Story, Const. § 1780.

The informations which passed without objection in U. S. v. Isham, 17 Wall. 496, and U. S. v. Buzzo, 18 Wall. 125, were for violations of the stamp laws punishable by fine only. And the offense which Mr. Justice Field and Judge Sawyer held, in U. S. v. Waller, 1 Sawy. 701, might be prosecuted by information, is there described as "an offense not capital or otherwise infamous," and, as appears by the statement of Judge Deady in U. S. v. Block, 4 Sawy. 211, 213, was the introduction of distilled spirits into Alaska, punishable only by fine of not more than $500, or imprisonment not more than six months. Act July 27, 1868, c. 273, § 4, (15 St. 241.)

Within the last 15 years, prosecutions by information have greatly increased, and the general

current of opinion in the circuit and district courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. U. S. v. Shepard, 1 Abb. C. C. 431; U. S. v. Maxwell, 3 Dill. 275; U. S. v. Block, 4 Sawy. 211; U. S. v. Miller, 3 Hughes, 553; U. S. v. Baugh, 4 Hughes, 501; s. c. 1 Fed. Rep. 784; U. S. v. Yates, 6 Fed. Rep. 861; U. S. v. Field, 21 Blatchf. 330; s. c. 16 Fed. Rep. 778; *In re* Wilson, 18 Fed. Rep. 33.

But, for the reasons above stated, having regard to the object and the terms of the first provision of the fifth amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted, to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger or being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.

Nor can we accede to the proposition, which has been sometimes maintained, that no crime is infamous, within the meaning of the fifth amendment, that has not been so declared by congress. See U. S. v. Wynn, 3 McCrary, 266; s. .c 9 Fed. Rep. 886; Same v. Same, 11 Fed. Rep. 57; U. S. v. Petit, 11 Fed. Rep. 58; U. S. v. Cross, 1 McArthur, 149. The purpose of the amendment was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States. We are not, indeed, disposed to deny that a crime, to the conviction and punishment of which congress has super-added, a disqualification to hold office, is thereby made infamous. U. S. v. Waddell, 112 U. S. 76, 82; s. c. *ante*, 35. But the constitution protecting every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of congress is needed to secure, or competent to defeat, the constitutional safeguard.

The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment. Infamous punishments cannot be limited to those punishments which are cruel or unusual, because, by the seventh amendment of the constitution, "cruel and unusual punishments" are wholly forbidden, and cannot therefore be lawfully inflicted even in cases of convictions upon indictments duly presented by a grand jury. By the first crimes act of the United States, forgery of public securities, or knowingly uttering forged public securities with intent to defraud, as well as treason, murder, piracy, mutiny, robbery, or rescue of a person convicted of a capital crime, was punishable with death; most other offenses were punished by fine and imprisonment; whipping was part of the punishment of stealing or falsifying records, fraudulently acknowledging bail, larceny of goods, or receiving stolen goods; disqualification to hold office was part of the punishment of bribery; and those convicted of perjury or subornation of perjury, besides being fined and imprisoned, were to stand in the pillory for one hour, and rendered incapable of testifying in any court of the United States. Act April 30, 1790, c. 9 (1 St. 112-117;) Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380, 381.

By that act no provision was made for imprisonment at hard labor. But the punishment of both fine and imprisonment at hard labor was prescribed by later statutes, as, for instance, by the act of April 21, 1806, c. 49, for counterfeiting coin, or uttering or importing counterfeit coin; and by the act of March 3, 1825, c. 65, for perjury, subornation of perjury, forgery, and counterfeiting, uttering forged securities or counterfeit money, and other grave crimes. 2 St. 404; 4 St. 115. Since the punishment of whipping and of standing in the pillory were abolished by the act of February 28, 1839, c. 36, § 5 (5 St. 322,) imprisonment at hard labor has been substituted for nearly all other ignominious punishments, not capital. And by the act of March 3, 1825, c. 65, § 15, re-enacted in Rev. St. § 5542, any sentence of imprisonment at hard labor may be ordered to be executed in a state prison or penitentiary. 4 St. 118.

What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first judiciary act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the district courts to cases "where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act September 24, 1789, c. 20, § 9, (1 St. 77.) But at the present day either stocks or whipping might be thought an infamous punishment.

For more than a century, imprisonment at hard labor in the State prisons or penitentiary or other similar institutions has been considered an infamous punishment in England and America. Among the punishments "that consist principally in their ignominy," Sir William Blackstone classes "hard labor, in the house of correction, or otherwise," as well as whipping, the pillory, or the stocks. 4 Bl. Comm. 377. And Mr. Dane, while treating it as doubtful whether confinement in the stocks or in the house of correction is infamous, says, "punishments, clearly infamous, are death, gallows, pillory, branding, whipping, confinement to hard labor, and cropping." 2 Dane, Abr. 569, 570.

The same view has been forcibly expressed by Chief Justice Shaw. Speaking of imprisonment in the State prison, which by the statutes of Massachusetts was required to be at hard labor, he said: "Whether we consider the words 'infamous punishment' in their popular meaning, or as they are understood by the constitution and laws, a sentence to the state prison, for any term or time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole State, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meager food, and to severe discipline. Some of these a convict in the house of correction is subject to; but the house of correction, under that and the various names of work-house and bridewell, has not the same character of infamy attached to it. Besides, the State prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital." Jones v. Robbins, 8 Gray, 329, 349. In the same case, Mr. Justice Merrick, while dissenting from the rest of the court upon the question whether under the words "the law of the land" in the constitution of Massachusetts an indictment by a grand jury was essential to a prosecution for a crime punishable by imprisonment in the state prison, and taking a position upon that question more accordant with the recent judgment of this court in Hurtado v. California, 110 U. S. 516; s. c. 4 Sup. Ct. Rep. 111, yet concurred with the other judges in holding that such imprisonment at hard labor was an infamous punishment. 8 Gray, 370-372.

Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime," spoken of in the provision of the ordinance of 1787, and of the thirteenth amendment of the constitution, by which all other slavery was abolished.

Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the fifth amendment of the constitution; and that the district court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment or presentment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged.

Writ of *habeas corpus* to issue.

THE DOCTRINE OF RESPONDEAT SUPERIOR, AS APPLICABLE TO MUNICIPAL CORPORATIONS.

BRYANT v. ST. PAUL.*

Supreme Court of Minnesota, April 1, 1885.

MUNICIPAL CORPORATION. [*Negligence.*] *Not Responsible for Negligences of Board of Health.*—A municipal corporation is not responsible for the negligences of its board of health, although the officers composing it are appointed, not by State, but by municipal authority.

Appeal from an order of the district court, Ramsey county.

S. P. Crosby and *W. H. Lightner*, for appellant, Ann Bryant. *W. P. Murray*, for respondent, City of St. Paul.

VANDERBURGH, J. delivered the opinion of the court:

The plaintiff in this action seeks to charge the defendant for the misfeasance or negligence of the board of health or its agents in leaving a vault upon private premises exposed and open after removing its contents, in consequence of which plaintiff, without fault on her part, fell into the vault and was injured.

By the charter of the city the board of health is coustituted a separate body, composed of the city engineer, city physician or health officer, and four members of the city council appointed by the president of that body. Its powers and duties are specially defined by the charter, and it is expressly authorized to make rules and by-laws for the government of the action of the board and its agents in the discharge of its and their duties, and it is made the duty of the police to enforce its sanitary regulations and orders. It is also clothed with authority within the limits of the city to enforce all laws of the State generally relating to the care and preservation of health, and is given jurisdiction over all lakes and water-courses in Ramsey county to the same extent as within the city. City Charter, c. 11, (Comp'n 1884.)

The provisions of the charter clearly mark and define the duties of the board as public and general in their character. Sp. Laws 1874, p. 91, as amended, Sp. Laws 1879; Sp. Laws 1883, c. 2, § 8. It is usual, either by general law or in municipal charters, to confer such authority upon local boards of health, to be exercised under the general police power of the State. And it is entirely immaterial, as affecting the question of the nature of the duties devolving upon such board, and the question of municipal responsibility, in what manner the legislature may direct and authorize its members to be appointed,—whether by the corporation or otherwise. Maxmilian v. Mayor, 62 N. Y. 160; Fisher v. Boston, 104 Mass. 93.

The charter also contains general provisions

*S. C., 23 N. W. Rep., 220.

authorizing the common council, by ordinance, to remove and abate nuisances injurious to the public health, and to make regulations for the preservation of health and suppression of disease, and to make and enforce quarantine laws. Chapter 4. But it is not alleged or claimed in this case that the board of health were acting under the direction of the corporation in excuting or enforcing any regulation in pursuance of which the alleged negligent act or omission occurred, or otherwise than in the exercise of the general discretionary powers conferred on it by the charter.

We are not, therefore, called on to consider the question of the liability of the municipality when it undertakes, in the exercise of its corporate powers, the performance of the act complained of, or specially directs or interferes in the premises. It is true, the complaint alleges that the defendant, through the said board of health, "caused said vault to be cleaned," etc.; but it is clear, we think, and was so assumed in argument, that the agency of the city referred to in the matter was simply its relation to the board of health as defined by the charter, and that the board was, in fact, acting by virtue of the powers thereby conferred. Chapter 11, § 5, of the charter, under which it appears by the complaint the board proceeded in this instance, provides that "said board may order or cause any excavation, room, building, premises," etc, in said city, "regarded by said board as in a condition dangerous to health, to be cleansed," etc. It is not, we think, to be implied that the city council took any express or affirmative action in the premises to direct the abatement of the nuisance in this case, but that it was done by the board in the ordinary course of its duties.

The question, then, presented for our consideration is whether the alleged negligence of the board created a corporate liability as against the city. The duty is imposed by the legislature upon the board of health, under the police power, to be exercised for the benefit of the public generally. It is one in which the city has no particular interest, and from which it derives no special benefit in its corporate capacity. And we think it clear that, as respects an agency thus created for the public service, the city should not be held liable for the manner in which such service is performed by the board. Dill. Mun. Corp. (3d Ed.) § 976, etc. It is bound to discharge its official duty, not by virtue of its responsibility to the municipality, but for the general welfare of the community, and no action will lie against the city for the acts of the board unless given by statute. Fisher v. Boston, *supra;* Hayes v. Oshkosh, 33 Wis. 318; Richmond v. Long's Adm'rs, 17 Grat. 375; Maxmilian v. Mayor, *supra*; Ogg v. Lansing, 35 Iowa, 495; Welsh v. Rutland, 56 Vt. 228; Findley v. Salem, 137 Mass.——; Condict v. Mayor, 46 N. J. Law, ——; s. c. 19 Cent. Law J. 213, and cases cited; Smith v. Rochester, 76 N. Y. 513.

The duties of such officers are not of that class of municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions, which could be discharged equally well through agents appointed by the State, though usually associated with and appointed by the municipal body. The nature of the duties as public are the same in either case.

In Kobs v. Minneapolis,[1] which we think presents a different question, but which is relied on by the plaintiff, a street commissioner dug a ditch across a street, whereby a large quantity of water was carried over to and upon plaintiff's lot from land opposite, and the city was properly held liable, because there the street commissioner was the agent of the city in the supervision and improvement of streets, with large discretionary power in the premises, and subject to control and removal by the city, and in making such ditch across the street he directly caused the flooding of plaintiff's lot. The responsibility for the care and control of streets belonged to the city, and he was acting for the corporation in the course of his employment in and about the discharge of a corporate duty. The city was bound so to use and control the street as not to injure the property of others. Oliver v. Worcester, 102 Mass. 490; Thurston v. St. Joseph, 51 Mo. 510.

The cases of Dayton v. Pease, 4 Ohio St. 96; Bailey v. Mayer, 3 Hill, 531; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, and other like cases, are clearly distinguishable from the case at bar. These were actions for damages resulting from the negligence or unskilfulness of the agents of the corporation in and about the supervision or management of corporate property, or the construction of public improvements under the authority of the municipality in its corporate capacity. The same remark will apply to cases generally where the corporation has directly authorized, participated in, or ratified (where for any cause it may lawfully do so) the alleged wrongful acts, or has derived a profit or corporate advantage therefrom, though it might not otherwise have been liable. De Yoe v. Saratoga, 1 Hun, 342; Tormey v. Mayor, 12 Hun, 546; Dooley v. Kansas City, 19 Cent. Law J. 490; Murphy v. Lowell, 124 Mass. 566; City of Toledo v. Cone, 41 Ohio St. But no such facts appear in this case to qualify the rule of corporate liability, and as between the city and the board *respondeat superior* is not applicable.

Order sustaining demurrer affirmed, and case remanded.

NOTE.—The above case and the recent decision of the Ohio Supreme Court Commission in the case of the City of Toledo v. Cove,[1] above cited, and commented on in a late number of the CENTRAL LAW JOURNAL,[2] holding the City of Toledo liable for injury to a work-

[1] 22 Minn., 159.

[1] 41 Ohio Sup. Ct. Com. 3; s. c. 1 Am. L. J. 406.
[2] 20 Cent. L. J. 62.

man caused by the negligence of the superintendent of a public cemetery owned by the city, have caused considerable discussion and awakened a renewed interest in the doctrine of *respondeat superior* as applied to municipal corporations.

An attempt will be made in this note to determine how far this doctrine is applicable to municipal corporations, and to state the rules governing its application.

The general rule is well settled that a master is liable to third persons for the negligent acts of his servant's or agent done within the scope or line of the servant or agent's duty.[3] And this is probably so, even though the acts be intentionally and wilfully done, if within the scope of the servant's employment.[4] The liability of the master depends, not so much upon the motive of the servant, as upon his act being within the contemplation of his employment, and something which, if lawfully done, he might do in the employer's name.[5] In all cases the general relation of master and servant, or principal and agent, must exist, and the act must be within the course or scope of the employment.

The first thing necessary, then, in determining the liability of a municipal corporation under the rule of *respondeat superior*, is to find whether or not the relation of master and servant, or principal and agent, exists between the party doing the negligent or wrongful act and the corporation.

Municipal officers are not always such agents or servants as will make the municipality liable for their wrongful actions; for while called officers of the corporation, it may in reality have no control over them, and their duty may be to the public rather than to the municipality as a corporation. Where this is so, the municipality is, as a rule, not liable.[6] The sovereign in such cases is the master or principal, rather than the municipal corporation, which is itself, to some extent, the agent of the sovereign or public.

But where the municipality has the power to appoint or elect its own officers, and can control, remove, and hold them responsible for their acts, it is liable for their wrongful or negligent acts, done in the exercise of its *corporate or private* duties.[7] The following rules relative to this point are laid down in a recent case;[8] "First. When, by a municipal charter in the distribution of powers and duties among the different municipal officers, duties of a public character are imposed, the officers are regarded as agents of the corporation, and it is liable for their acts or omissions.[9] Second. A municipal corporation is held liable for the acts of an agent it employs to do business for its own corporate or private benefit, the same as a private individual, and this, although the agent may be appointed by the legislature, or under legislative authority, if it accepts and ratifies the appointment.[10] Third. When a *ministerial* duty is expressly imposed upon a municipal corporation by legislative enactment, in the performance of which the public are interested, it may be held liable, although the circumstances are such that an implied acceptance of the particular provisions may not be inferred." This distinction between the acts of municipal officers in the discharge of a public or *quasi* legislative or judicial duty cast upon the municipality by the State, and the acts of its officers in the discharge of a private duty to the corporation, though a very shadowy one at times, is well established by authority.[11]

Thus it has been held that a city is not liable for the negligent or wrongful acts of its police officers, even though appointed by the city; for their duty is to see that the *public* peace is kept.[12] Nor is it liable for the negligence of its fire department.[13] And this is so not only where property is burned because of such negligence, but also where the person or property of a citizen is injured by the negligence of the firemen in going to or from a fire.[14] So, if a municipal corporation establishes a public hospital to prevent the spread of contagious diseases and for the good of the general health, it is not liable for the neglect or misconduct of its agents or servants therein.[15] So, it is held, a city is not liable to a pupil in one of its public schools for an injury caused by a negligent defect in the staircase or heating apparatus of the school.[16] And in New York, it has been held that a city is not liable for the negligence of an employee of the commissioners of public charities or of the Department of Public Instruction, the statute requiring such officers, and their duties being public.[17]

On the other hand where the act is done in the exercise of a duty to the municipality for its private interest or advantage, and the duty is one in which the State, in its sovereign capacity, has no interest, the corporation will be held responsible, even though it may not have entire control over the officers perform-

[3] Ewell's Evans' Agency, 479, note; Garretzen v. Duenckel, 50 Mo. 104; s. c. 11 Am. Rep. 405; Minter v. Pacific R. R., 41 Mo. 503; Howe v. Newmarch, 12 Allen, 49; Joslin v. Grand Rapids Ice Co., 50 Mich. 516; s. c. 45 Am. Rep. 54; 1 Addison on Torts, § 36; Wharton Neg. § 157 *et seq.*; See note to Ware v. Barataria etc. Co., 35 Am. Dec. 189, 192; Wood's Master and Servant, § 279.

[4] Rounds v. Dela. etc. R. Co., 64 N. Y. 129; s. c. 21 Am. Rep. 597; Redding v. S. C. R. Co., 2 S. C. 1; s. c. 16 Am. Rep. 681; Craker v. C. & N. W. R. Co., 36 Wis. 657; Phila. & Reading R. Co. v. Derby, 14 How. (U. S.) 486; Chicago etc. R. Co. v. Dickson, 63 Ill. 151; s. c. 14 Am. Rep. 114.

[5] Cooley on Torts, 535, 536.

[6] New York etc. Co. v. Brooklyn, 71 N. Y. 580; Lorillard v. Town of Monroe, 11 N. Y. 392; Maxmilian v. Mayor, 62 N. Y. 160; Fisher v. Boston, 104 Mass. 87; s. c. 6 Am. Rep. 468; Prather v. Lexington, 13 B. Mon. 563; City of La Fayette v. Timberlake, 88 Ind. 330; Wheeler v. City of Cincinnati, 19 Ohio St. 19; s. c. 2 Am. Rep. 368; Welsh v. Village of Rutland, 56 Vt. 228; s. c. 48 Am. Rep. 762.

[7] 2 Dillon Munic. Corp. § 974 (772); Gibson v. Preston L. R. 5 Q. B. 219; Eastman v. Meredith, 36 N. H. 284; City of Greencastle v. Martin, 74 Ind. 449; Ross v. City of Madison, 1 Ind. 281; Lloyd v. Mayor, 5 N. Y. 369; Ehrgott v. Mayor, 96 N. Y. 264.

[8] New York etc. Co. v. Brooklyn, 71 N. Y. 580, 583.

[9] Citing Conrad v. Trustees, 16 N. Y. 158, and note.

[10] Appleton v. Water Comrs., 2 Hill, 433.

[11] See 2 Dillon Munic. Corp. § 966 (764), and authorities cited in following notes; also 2 Thomp. Neg. 731, *et seq.*

[12] Elliott v. City of Phila., 75 Penn. St. 342; s. c. 15 Am. Rep. 591; Campbell's Adm. v. City Council, 53 Ala. 527; s. c. 25 Am. Rep. 656; Calwell v. City of Boone, 51 Ia. 687; s. c. 33 Am. Rep. 154; Burch v. Hardwicke, 30 Gratt. 24; s. c. 32 Am. Rep. 640; Buttrich v. City of Lowell, 1 Allen, 172; Bowditch v. Boston, 101 U. S. 16; Pollock's Adm. v. Louisville, 13 Bush. 221; s. c. 26 Am. Rep. 200.

[13] Robinson v. City of Evansville, 87 Ind. 334; s. c, 44 Am. Rep. 770; Brinkmeyer v. Same, 29 Ind. 187; Fisher v. City of Boston, 104 Mass. 87; s. c. 6 Am. Rep. 196; Heller v. Sedalia, 53 Mo. 159; s. c. 14 Am. Rep. 444.

[14] Wilcox v. City of Chicago, 107 Ill. 334; s. c. 47 Am. Rep. 434; Hafford v. New Bedford, 16 Gray, 297; Hayes v. City of Oshkosh, 33 Wis. 314; s. c. 14 Am. Rep. 760; Greenwood v. Louisville, 13 Bush. (Ky.) 226; s. c. 26 Am. Rep. 263; Jewett v. City of New Haven, 38 Conn. 368; s. c. 9 Am. Rep. 382.

[15] Murtaugh v. St. Louis, 44 Mo. 479; Richmond v. Long, 17 Gratt. 375; Sherbourne v. Yuba Co., 21 Cal. 113. See, also, Brown v. Vinalhaven, 65 Me. 402; s. c., 20 Am. Rep. 709; Ogg v. Lansing, 34 Iowa, 495; s. c., 14 Am. Rep. 490.

[16] Hill v. Boston, 122 Mass. 324; Wixon v. Newport, 13 R. I. 454; s. c., 43 Am. Rep. 35. The former case contains an elaborate review of the authorities on this general question. See, also, Kincaid v. Hardin, 35 Iowa, 430; s. c., 36 Am. Rep. 236.

[17] Maxmilian v. Mayor, 62 N. Y. 160; Ham v. Mayor, 70 N. Y. 459. And see Atwater v. Baltimore, 31 Md. 462.

ing such duty. Thus the water commissioners of the City of New York were held to be the agents of the city, and the latter was held liable for their negligence, although they were selected by the governor and senate.[18] So a city is liable for an injury caused by the negligence of its servants in laying its own gas-pipes.[19] And where a city owns private corporate property, such as a wharf, from which it derives a revenue or profit, it is liable for injuries caused by failure of its agents to keep it in proper condition.[20] So where a town, carrying on a farm for the support of its poor, negligently allowed a ram to run at large and injure a citizen, it was held liable.[21] This last case, and the case of Hannon v. St. Louis Co.,[22] where a county was held liable for the negligence of its servants in performing work at the county insane asylum, are much like the cemetery case of the City of Toledo v. Cone, already referred to.[23] These cases while supporting each other, and together making a precedent that cannot be overlooked in deciding future cases, seem very hard to uphold on principle, and contrary to those cases in which it is held that a municipality is not liable for the negligence of its firemen, its hospital attendants, and the like. The maintenance of a cemetery, a poor farm, or an insane asylum, seems to the writer an act for the public benefit, and one in which the State is interested, just as much as in the maintenance of county and city hospitals, or even a police or fire system. So it is difficult to uphold on principle those cases which hold municipal corporations liable for injuries to travelers caused by the non-repair of their streets and highways; yet, outside of New England the great weight of authority is to that effect.[24] Statutes in many of the States, however, govern the matter, and the only way to uphold such cases is to say that for statutory, or other reasons, they constitute a well-established exception to the general rule.

The second point to be considered in determining the liability of municipal corporations for the acts of their officers or agents is the nature of the act, whether it is in the line of the agent's duty or not. To do this, it is first necessary to determine whether it is one which the municipality has power to have performed, for if it be *ultra vires* it can not be the officer's duty to do it.

Thus, where the city officials of Albany undertook to build a bridge under the authority of an unconstitutional law, and because of the negligent construction the bridge fell, it was held that the city was not liable at the suit of a person injured thereby.[25] So where the common council appointed a committee to make arrangements for the celebration of the centennial, and the committee ordered the fire department to join in the procession, it was held that the city was not liable to one who had negligently been run over by a hose cart, as the calling out of the hose cart for such purpose was unanthorized by law.[26] And where the selectmen of a town caused a dam to be erected—which they had no legal authority to do—it was held that the town was not liable to one whose land had been flooded thereby.[27]

The general rule is thus stated: "To establish the liability of a municipal corporation for damages resulting from the alleged negligence or want of skill of its agent or servant in the course of its employment, it is essential to show that the act complained of was within the scope of the corporate powers; if, outside of the powers of the corporation, as conferred by statute (or its charter,) the corporation is not liable, whether its officers directed the performance of the act, or it was done without any express direction."[28]

But even if the act be within the corporate powers, the corporation cannot be held liable unless it be also within the line and scope of the officer's or agent's employment. Thus, a city is not responsible for the negligence of the city surveyor or engineer in performing work for private parties.[29] So, in a case just reported it was held that a town is not liable for an injury caused by fire-works discharged by citizens, in violation of an ordinance, even though the council and officers took an active part in the celebration.[30] So it has been held in a number of cases that a municipal corporation is not liable for the trespasses or wrongful acts of its officers, though done *colore officii*, unless authorized or ratified by the corporation.[31]

Indianapolis, Ind. W. F. ELLIOTT.

[18] Bailey v. Mayor, 3 Hill, 531; s. c., 38 Am. Dec. 669; DeGee v. Saratoga Springs, 5 Hun, 343; Clarke v. Mayor, 3 Barb. 290; Aldrich v. Tripp, 11 R. I. 141; s. c., 23 Am. Rep. 434.

[19] Scott v. Mayor, etc., 1 H. & N. 59; s. c., 2 H. & N. 204.

[20] Pittsburgh v. Grier, 22 Pa. St. 54; Skinkle v. Covington, 1 Bush. (Ky.) 617; Fennimore v. New Orleans, 20 La. Ann. 124. So as to water-works, gas-works, and the like where the city receives tolls or profits. Murphy v. v. Lowell, 124 Mass. 564; Hand v. Brookline, 126 Mass. 324; Henly v. Mayor, 2 Cl. & F. 331.

[21] Moulton v. Scarborough, 71 Me. 267; s. c., 36 Am. Rep. 308.

[22] 62 Mo., 313.

[23] Note 1, *supra*.

[24] See 2 Dillon Munic. Corp., §§ 998, 1014, 1017, 1018 and notes.

[25] Mayor v. Cunliff, 2 N. Y. 165. To same effect, Browning v. Board, 44 Ind., 11; Haag v. Board, 60 Ind. 511; s. c. 28 Am. Rep. 654; Board v. Deprez, 87 Ind. 509.

[26] Smith v. City of Rochester, 76 N. Y. 506. See also Morrison v. Lawrence, 98 Mass. 219.

[27] Anthony v. Adams, 1 Metc. (Mass.) 284. And see Walling v. Shreveport, 5 La. An. 660.

[28] Smith v. City of Rochester, 76 N. Y. 506. Approved in Cummins v. City of Seymour, 79 Ind. 491, opin. 496; s. c., 41 Am. Rep. 618. See also Hunt v. City of Boonville, 65 Mo. 620; s.c., 27 Am. Rep. 299; Trammell v. Town of Russellville, 34 Ark. 105; s. c., 36 Am. Rep. 1.

[29] Alcorn v. Phila., 44 Penn. St. 348.

[30] Ball v. Town of Woodbine, 61 Ia. 83; s. c., 47 Am. Rep. 805. See also Cumberland v. Willison, 50 Md. 138, where a city was held not liable for the extra-official act of its mayor.

[31] Hunt v. City of Boonville, 65 Mo. 620; s. c., 27 Am. Rep. 299; Wallace v. City of Menasha, 48 Wis. 79; s. c., 33 Am. Rep. 804; 10 Cent. L. J. 147; Thayer v. Boston, 19 Pick. 511; Lee v. Sandy Hill, 40 N. Y. 442; Fox v. Northern Liberties, 3 Watts & S. 103; Perley v. Georgetown, 7 Gray, 464; Mayor v. Musgrave, 48 Md. 272; s. c., 30 Am. Rep. 458. But see Durkee v. City of Kenosha, 59 Wis. 123; s. c., 47 Am. Rep. 480, where a city was held liable a sale of property by its officers to pay a void street assessment.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION — *Action on Administrator's Bond—Accounting First Necessary.*—No action

can be maintained on the bond of an administrator, to recover the amount of a claim unlawfully paid by him, until an accounting has been had in the probate court, and the administrator has refused to pay what, if anything, may be adjudged against him thereon. [Ross, J., in delivering the opinion of the court said: "It has several times been decided by this court that the allowance of a claim by the administrator and probate judge is not conclusive upon the heirs, but that they may contest such allowance in subsequent proceedings of the probate court: Code of Civil Procedure, § 1636; Estate of Loshe, 62 Cal. 413; Estate of Hill, Id., 186. If the allowance of the claim sought to be contested by the present suit was improperly had, and objection is made at the proper time in the probate court having control of the administration, that court will doubtless vacate the allowance and compel the administrator to account for the money paid thereon out of the funds of the estate. It is for the probate court to settle the accounts of the administrator, and we have frequently so held: Estate of Curtis, 3 West Coast Rep., 682; Chaquette v. Ortet, 60 Cal. 549, and authorities there cited. After the *status* of the accounts has been fixed, if the administrator shall fail to pay what, if anything, may be adjudged against him, the plaintiffs will have their action upon the bond." *Weihe v. Stratham*, S. C. Cal., May 28, 1885; 6 W. C. Rep. 563.

2. BANKRUPTCY—*Sufficiency of Promise to Revive Debt Discharged by.*—In order that a promise to pay a debt made by one pending his bankruptcy proceedings, may revive the debt discharged by the adjudication of bankruptcy, it must be clear and specific. [The promise was oral in the words: "I will make it all right. You will not lose anything." The court cite: Shockey v. Mills, 71 Ind. 288; Allen v. Ferguson, 18 Wall. 1]. *Meech v. Lamon*, S. C. Ind., May 26, 1885.

3. CHAMPERTY—*Essential Elements of.*—There are two essential elements in every champertous agreement, that is 1, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit, and 2, an agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event it proves successful. In a case of an absolute sale and transfer of an undivided interest, which the grantor has or may afterward acquire in land in the adverse possession of others, the grantor having no suits pending to recover his interest or any part of it, under an agreement that the grantee shall institute legal proceedings in his own name and at his own expense for the purpose of recovering and establishing the title of the grantee so conveyed, no part of which is to be divided between them, but by which agreement the grantee is to pay a given price per acre of the land recovered, and nothing, if the litigation proved unsuccessful, it was held that both the essential element to a champertous agreement were wanting, and that the transaction was not void for champerty. *Torrence v. Shedd*, S. C. Ill., Ottawa, Sept. 27, 1884.

4. —— *No Defense by Adverse Claimant, in a Proceeding for Partition.*—If a conveyance of an undivided interest in land in the adverse possession of others, is made under a champertous agreement, the adverse claimants can not avail of the champerty as a defense to a proceeding by the grantee for a partition. The question of champerty can not properly arise except in a controversy between the parties to the alleged champertous agreement or their privies. *Ibid.*

5. —— *Compensation for Land Sold May be Made to Depend on a Contingency.*—A party owning an interest in land held and claimed adversely, may sell the same for a consideration to be paid upon a contingency, as upon a recovery of the land by the grantee. The owner may convey his interest in land even without any compensation, present or prospective, and he may contract to receive nothing in case his interest cannot be legally established, so that the purchaser may recover the same. *Ibid.*

6. CORPORATION—*Action cannot be Brought against a Stockholder Under Missouri Statute Unless Corporation Dissolved.*—A creditor who recovers judgment in a State court against a corporation cannot, under the Missouri Statutes, while the corporation remains undissolved, maintain an action at law in this court against a stockholder in the corporation to recover an amount due from him on unpaid stock. In the absence of any statutory proceedings such matters are only cognizable in equity. [In giving the opinion of the court, Treat, J., said: Matters of this nature are cognizable in equity, and only in equity, unless there is some statutory proceeding with respect thereto. That has been fully determined, notably in a case in 106 U. S. Patterson v. Lynde, 106 U. S. 519; S. C., 1 Sup. Ct. Rep. 432. Now, the Missouri statute has two provisions: 1. Execution having been returned *nulla bona*, to cite in a stockholder and award what is in the nature of a judgment, that is a new execution against him for the portion of the stock unpaid. But that must be done in the court where the original judgment was rendered. 2. There is another provision that, where the corporation is dissolved, you may proceed by an independent suit. Now, nothing of the kind has occurred in this case. The party has no standing under the statute at all, nor has he pursued the remedy which the statute prescribes. So far, then, as this court is concerned, a common-law action cannot be tried in this way against a stockholder of an undissolved corporation."] *Brown v. Fisk*, Cir. Ct. E. D. Mo., March 20, 1885; 23 Fed. Rep. 228.

7. COUNTIES—*Liable for Injuries from Defective Bridge.*—In the absence of a statute expressly imposing such liability, a *quasi* corporation, such as a county, is not responsible for injuries caused by a failure to keep bridges, under its control, in repair. Such liability has not been imposed upon the county of Contra Costa, by § 50 of the Act of 1875, concerning roads and highways in such county. [Ross, J., in giving the opinion of the court said: "In the United States there is no common law obligation resting upon *quasi* corporations, such as counties, townships and New England towns to repair highways, streets or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a public and not a corporate duty, and to regard such corporations, in this respect, as public or State agencies, and not liable to be sued civilly for damage, caused by the neglect to perform this duty, unless the action be expressly given by stat-

ute:" Dillon's Munic. Corp., vol. 2, § 996. Such is the rule in this State: Sherbourne v. Yuba Co., 21 Cal. 113; Huffman v. San Joaquin Co., Id., 427; Crowell v. Sonoma Co., 25 Cal. 313; Winbigler v. Los Angeles, 45 Cal. 36."] *Barnett v. County of Contra Costa*, S. C. Cal., May 28, 1885; 6 W. C. Rep. 561.

8. CRIMINAL PROCEDURE— *Quashing Venire.*—To justify the quashing of a venire on account of irregularities in the drawing of the same, it must appear that a fraud was committed or a great wrong done to the serious prejudice of the party or parties accused. *State v. Sauchey*, S. C. La., April 13, 1885.

9. —— *Record must Show Return of Indictment into Court.*—Where the record does not show that an indictment was returned into court by the grand jury, the case must be remanded and the sentence set aside. *State v. Sauchey*, S. C. La. April 13, 1885.

10. DEED—*When Quit Claim Deed Construed as Passing a Subsequently Acquired Interest in Land.* A quit-claim deed contained the following language in substance, that the grantee "has remised, released, etc., and by these presents does remise, release, alien, confirm, convey and forever quit claim all title which said party of the first part has in and to the following described lot, etc., situate etc., to-wit, in such manner as he may, and to the extent that he has heretofore acquired title thereto, the north quarter of," etc.: *Held*, that such deed passed only the grantor's interest in the land at the time of its delivery, and not any further interest he might thereafter have acquired. *Torrence v. Shedd*, S. C. Ill., Ottawa, Sept. 27, 1884.

11. EXEMPLARY DAMAGES — *Wilful Refusal of County Commissioners to Levy Tax to Pay Judgment.*—In an action against county commissioners to recover damages for a wilful refusal on their part to levy a taxable property in a township to pay off a judgment held by plaintiff against such township, in obedience to a peremptory writ of *mandamus* from the United States circuit court, plaintiff will be entitled to recover exemplary or punitive damages, although the actual damage sustained by him was merely nominal. *Wilson v. Vaughn*, Cir. Ct. Dist. Kan. Mar. 4, 1885, 23 Fed. Rep. 229.

12. HOMESTEAD—*Debts Contracted before Adoption of Law.*—1. The homestead law is not void as to debts contracted before its adoption, and is inoperative only when such debts could not otherwise be collected out of the debtor's property. *Lawdermilk v. Chorpenning*, S. C. N. C., Spring Term, 1885.

13. —— *How Allotted under Execution on such Debts.*—The homestead should be allotted when executions are issued on such debts, and the excess first applied to the payment of the execution, and if sufficient for that purpose, the debtor should be allowed to retain his homestead. *Ibid.*

14. —— *Sale Subject to Homestead — Title of Purchaser.*—Where an execution issued on such debt, and the sheriff sold the real property of the debtor subject to the homestead, the purchaser acquired the reversion after the termination of the homestead. *Ibid.*

15. —— *Statute Prohibiting Sale of Reversionary Interests in Homesteads not Retroactive.*—The act of the 25th of March, 1870, which prohibits the sale of the reversionary interest in land charged with the homestead exemption, cannot deprive a creditor of a vested right acquired by docketing his judgment before the act was passed. *Ibid.*

16. MARRIED WOMAN.—*Her Contract of Suretyship to be Construed with Reference to the Inquiry whether She was to Receive Benefit from Same.*—Under the statute a married woman cannot enter into a contract of suretyship. When she joins her husband in a contract the question whether or not she is a principal or surety is not to be determined from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was she to receive, either in person or in benefit to her estate, or did she receive, the consideration upon which the contract rests? To the extent that she received the consideration she is a principal and liable. And the burden is on the plaintiff to show for what purpose she contracted. [Citing West v. Laraway, 28 Mich. 464.] *Vogel v. Leichner*, S. C. of Ind., June 21, 1885.

17. MECHANICS' LIENS—*May be Established for Repairs of Trust Property.*—Certain property was conveyed to trustees to receive the profits and pay them over to the *cestui que trust*, beyond the necessary expenses incident thereto. The trustees contracted a debt for repairs, and the creditor filed a mechanic's lien on the property: *Held*, that the trustees had the power, under the provisions of the deed, to make a contract on the credit of the trust property for necessary repairs; and that it was error in the court below to refuse a judgment to enforce the lien by a sale of the property, until the *cestui que trust* were made parties defendant, and were given an opportunity to be heard. *Cheatham v. Rowland*, S. C. N. C., Spring Term, 1885.

18. NEGLIGENCE. — *Proximate Cause of Death—Driver Ordering Boys off of Car.*—The driver of a feed car, running on one of the streets of the city, allowed boys to ride by his side on the platform fare free. On their getting troublesome he ordered them to get off, slackening his car to a mule walk, without touching, throwing off or threatening either. One pushed another, who, losing his balance, fell, slipping under and being crushed by the vehicle, death ensuing later. Under such circumstances the company cannot be held liable. The injury was not the natural and probable result of the driver's order, and such an occurrence as he might and ought to have reasonably foreseen. It was the consequence of the act of one for whose acts the company is not responsible, and who, like the injured party, was an intruder on the car. *Lott v. New Orleans City & Lake R. Co.*, S. C. of La., April 13, 1885.

19. PRACTICE IN EQUITY.—*When Court may Overrule Motion to Dissolve Injunction and Continue Injunction until Final Hearing.*—When a motion to dissolve an injunction is heard upon the bill and answer, and the answer denies all the equity of the bill, it is usual to dissolve; but for good cause shown, the court may overrule the motion and continue the injunction to the hearing, without adjudicating the principles of the cause. A case in which a motion to dissolve was properly overruled and the injunction continued to the hearing. [Citing Baltimore, etc. R. Co. v. Wheeling, 13 Gratt. 58.] *Kahn v. Kerngood*, S. C. of App. Va., March 19, 1885; 9 Va. L. J. 369.

20. RAILWAYS.—*Consolidation—Liability for Dam-*

ages Since the Consolidation.—Under a consolidation of two railroad companies the corporation thus formed is alone responsible for all damages resulting from acts committed or works made since the act of consolidation, although the road-bed alleged to have caused the damages claimed was the property and had been begun by one of the companies which went into consolidation. *Day v. N. O. Pacific R. Co.*, S. C. of La., March 16, 1885.

21. SALES OF PERSONAL PROPERTY—*Purchaser Estopped by Non-Performance of Conditions of Purchase from Setting up Breach of Warranty.*—In an action upon promissory notes given on the purchase of a threshing-machine sold with such warranty, there being no proof of performance of the conditions on the part of the purchaser, he having used the machine for more than one year, and paid part of the purchase money, is estopped from making the defense of breach of warranty for the first time, or recovering damages under such warranty; and in this case the court should have directed a verdict for the plaintiff. [In giving the opinion of the court, Hudson, J., said: "It is a fundamental principle of law, that has never been departed from by any respectable court, that when the obligations of an express warranty are concurrent either who seeks to enforce the obligations of the other must prove performance on his part, or an offer to perform. Alb. Tr. Ev. 313; Dunham v. Pettee, 8 N. Y. 508; Nichols v. Knowles, 18 N. W. Rep. 413; Wendall v. Osborne, Id. 709; Worden v. Sycamore Harvester Co. 7 N. W. Rep. 756. The warranty was in writing. The terms of it must control. Whatever that warranty is,it must be kept by both parties. If the plaintiff did not keep and perform its part of the contract,—in other words, if the machine did not work according to the warranty,—then the defendant had his rights under it; and after a trial of two weeks, and after giving written notice to the plaintiff or its agent, stating wherein it failed to satisfy the warranty, and allowing the plaintiff time to remedy the difficulty, then, if it did not fill the warranty, the defendant could have returned it to the place where received, and have another machine substituted, or the money and notes returned. These conditions were not performed within the letter or spirit of the contract. No act seems to have been done in that direction for at least one year after the purchase. The defendant treated the transaction, for a longer time than that, as a complete sale of the property, having in the mean time acknowledged his liability on the notes, and paid on them the sum of $315. It was then too late to make the defense which was set up. After this acceptance and use of this machine for so long a time by the defendant, and this payment on his notes, he was estopped from rescinding the contract, or recovering damages upon it; his mouth was closed, his day of grace had passed. Webster v. Phœnix Ins. Co., 36 Wis. 67; Abbott v. Johnson, 2 N. W. Rep. 332; Nichols v. Hall, 4 Neb. 210; Miller v. Nichols, 5 Neb. 478; Pitts Sons' Manuf'g Co. v. Spitsnogle, 6 N. W. Rep. 71; Bayless v. Hennessy, Id. 46."] *Burlington etc. R. Co. v. Kearney County*, S. C. Neb., May 13, 1885; 23 N. W. Rep. 559.

22. SEAMEN'S WAGES—*When Voyage Deemed to have Terminated.*—Libelants shipped as seamen on board the bark E., and signed articles for "a voyage from Iqqiqui, So. Am., to Hampton Roads, for orders, and to any port or ports wherever the master may direct in the U. S. of America * * *; the voyage not to exceed eight calendar months." At Hampton Roads the vessel received orders, for New York, where, on arrival, she discharged all her cargo. The libelants then left the vessel, and were entered in the log as deserters by the captain, who refused in consequence to pay the balance of wages up to the time they left. *Held*, that had there been other parts of cargo to be delivered at other ports, under orders received at Hampton Roads, the voyage would not have terminated until the delivery of the residue of the cargo. As it was, the voyage provided for by the shipping articles, terminated at New York; the libelants were there entitled to their discharge, and could not be treated as deserters. *The Edwin.* Dist. Ct. S. D. N. Y., Feb. 18, 1885; 23 Fed. Rep. 255.

23. ———. *Rate of Wages where Mate is Disrated.*—One of the libelants shipped as second mate, but was afterwards justifiably disrated. *Held*, that he was entitled only to the same wages as the other able seamen for the remainder of the voyage. *Ibid.*

24. ———. *Articles sold to Seamen, how far Allowed as Off-set.*—Articles sold to seamen by the master during the voyage are allowed as an off-set to wages, at a rate not above 10 per cent. over the cost to the master. A charge in excess of that held unreasonable and oppressive. Act June 26, 1884. *Ibid.*

25. TRUSTS—*Parol Evidence of an Executed Parol Trust when Admissible.*—Parol evidence of an executed parol trust in lands is admissible against a judgment creditor of the trustee, who holds by absolute deed while the *cestui que trust* holds possession. [Citing Sieman v. Austin, 33 Barb. 9; Borst v. Nalle, 28 Grat. 423; Moore v. Cottingham, 90 Ind. 239.] *Hays v. Reger*, S. C. Ind., May 26, 1885.

CORRESPONDENCE.

A MERCHANT'S "BLACK LIST."

To the Editor of the Central Law Journal:

I am attorney and agent for an institution known as the United States Merchants' Protective and Collection Association.

I am required by my contract with the association, to collect all debt given me by the members of the association, and to report those who will not pay, and can not be forced to pay by law, for want of sufficient property to execute judgment on a black list to be printed and circulated amongst the members of the association; these reports are confidential and for the members only. We send each one two notices before placing the name on the list; some parties come up and deny the claim, and say they at first intended allowing their names to be published, and then bring action for libel.

Now, if a member gives us a name and amount for collection, and we notify the party twice, and get no reply, and we report them in good faith, and it should turn out afterward that he did not owe, could we be held to answer for libel, or could be excused on the ground of privileged communication?

Please inform us on this point, as it is important to me. Form B. is sent first and Form C in ten days later. Find these forms inclosed. Yours respectfully,

Covington, Ky. ***

Appended to the foregoing were the following forms:—

(FORM B)

M. T. COLLORD, Pres. F. N. PIKE, Sec.
CHARLES BARNETT, Gen'l Traveling Agent.
LOWREY JACKSON (Ward & Jackson), Attorney for Association.
12 College Building, Cincinnati, O.

United States Merchants' Protective and Collective Association, General Office, Cincinnati, O. P. O. Box 1166. For the Protection of Merchants and Collection of Debts in the United States.

——————————1885.

Dear Sir:—

The U. S. Merchants' Protective and Collection Association have placed in my hands for collection a claim against you, past due, for the sum of———— Please call and settle, in order to save expense of litigation and inconvenience to you.

We would request a reply at once, as———— required to report to General Office those who fail or neglect to pay. Yours respectfully,

Attorney for Ass'n.

Second Notice. (FORM C)

M. T. COLLORD, Pres. F. N. PIKE, Sec.
CHARLES BARNETT, Gen'l Traveling Agent.
LOWREY JACKSON (Ward & Jackson), Attorney for Association.
12 College Building, Cincinnati, O.

United States Merchant's Protective and Collection Association, General Office, Cincinnati, O. P. O. Box 1166. For the Protection of Merchants and Collection of Debts in the United States.

——————————1885

Dear Sir:—

I notified you on the———day————188—— that the claim of———— amounting to————Dollars, past due, has been placed in my hands for collection against you, and requesting a speedy settlement. You failed to answer; hence I notify you again that if said claim is not adjusted within ———— days from date hereof, your name will appear on our Monthly Report of Delinquents, which will be circulated among business men in every city in the United States, as well as your city, and as a consequence is bound to injure your credit more or less. To save yourself the consequences, you will please call and settle at once.

We trust that within the time specified you will adjust this matter without further trouble or expense, Yours respectfully,

Attorney for Ass'n.

REMARKS.—We would thank any of learned readers for an answer to the inquiry of the above correspondent, giving authorities. Our own opinion is that a person who undertakes to collect debts by this means proceeds at his peril, and that if he makes a mistake he is answerable in damages as for a libel. The claim of good faith ought not to be listened to, when made by a man who engages in such a business. The business itself necessarily negatives the idea of good faith. In many cases of this kind, there may be honest differences between the merchant and his customer. A customer may have an honest counterclaim against a merchant for deficiency of the goods in quality or quantity; or he may have remitted; or he may have done that which may or may not amount to the payment of the bill according to the decision of a close question of law,—as where he has remitted by check on a bank which has suspended before the presentation of the check; or he may be the victim of a temporary misfortune. In all these cases the attorney of the association sits in judgment upon the credit of the customer, *ex parte*; he decides all questions, although he is a paid agent of the other party to the controversy; he not only renders a summary judgment, but he proceeds at once to inflict the punishment, by putting the name of the person upon the "black list," and circulating it widely among merchants. We say that an attorney who deliberately engages for gain in this business proceeds at his peril, and if he makes a mistake, and injures the reputation of an honest merchant, ought not only to be answerable in damages, but ought to be punished for a criminal libel. Lawyers cannot debate about the propriety of a member of their profession joining a concern which collects debts in this way. A lawyer who will do it ought to be disbarred. We once heard of a club, some of whose members were gentlemen, who roped in outsiders by glowing promises, and then collected its dues of them by "posting" them when delinquent; but the keeper of the lowest beer saloon on the "Rhine" in Cincinnati would not collect his scores in this way.

JETSAM AND FLOTSAM.

TRANSFUSION OF BLOOD.*

The defendant, a lawyer, lay stretched on his bed,
From the cause, quite infrequent, of being well fed.
An attachment had formed 'twixt the Gout and his joints,
That presented a case of most difficult points.

From a long course of practice, the man of the law
Had become quite accustomed to search for a flaw.
Or a defect of some kind in bringing the case,
Before looking the merits direct in the face.

Thus hoping, his brain rushed along the old furrows,
Here grasping at motions, and there at demurrers.
But alas! they were all overruled with a rout,
And possessed of the field, stood the plaintiff, the Gout

The case became frightful; in fact, 'tis contended
All charges of living too *high* would have ended,
Had not a few wise men in mercy discovered
A system of treatment by which he recovered.

All praise to the savants who in the confusion
Of physic and nostrums have brought us Transfusion.
All hail! Great Restorer! Thou boon to the ages;
The dream of the poets and hope of the sages!

We welcome thy coming; and as for the lawyer,
Who but for thy aid had been "dead as a sawyer,"
'Tis said he proclaims with but slight hesitation,
"Transfusion has saved a wise man to the nation."

But here we must mention before we have ended,
That since he recovered there seems to be blended,
In all of his actions a kind of delusion,
That threatens to bring about endless confusion.

The longest of graces are said at his dinners;
In speaking to juries, he calls them all "sinners;"
When he reaches the point where his joke should come in,
He forgets his old stand-by, and talks about "sin."

At length, his strange conduct attracting suspicion,
That something was loose in his upper addition,
His friends became anxious to know the occasion
Of such a disturbance of mental equation.

Nor long were they waiting; the strong predilection
He shortly developed, to raise a collection,
By "passing the hat," itself was their teacher:
The lawyer was cured by the blood of a preacher.

Opelika, Ala.

* Written expressly for this journal by "our own Parnassian Correspondent," who will please write some more. Copyright 1886. Notice to other law journals: Don't you steal this.—[ED. C. L. J.